SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1968

No. 412

ROGER LEE GLAVIN and ROBERT LORING CHESNEY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Concise Statement of Case	5
Reasons for Granting the Writ	10
1. Ruling Contrary to the Decision of This Court on Assistance of Counsel	10
2. Decision Upholding Instruction That Guilt May Be Inferred Appears to Conflict With Decision of This Court	14
3. Important Question of Law Which Should Be Settled	17
4. Additional Errors	19
A. Admission Without Foundation of Hearsay Documents	19
B. Search, Arrest Then Seizure	19
Conclusion	21
Appendix. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1

TABLE OF AUTHORITIES CITED

Cases

	Page
Glasser v. United States, 315 U.S. 60	10, 11, 14
Gonzales v. United States, 314 F. 2d 750	10
Griffith v. State of California, 380 U.S. 609	16
Hartzell v. U.S., 72 F. 2d 569	19
Henry v. United States, 371 U.S. 98	20
Juvera v. United States, 378 F. 2d 433	10
Lugo v. United States, 350 F. 2d 858	10
Morissette v. United States, 342 U.S. 246	14, 15, 16
United States v. Gainey, 380 U.S. 63	14, 15
Wolcher v. U.S., 200 F. 2d 493	19

Rules

Rules of the Supreme Court of the United States, Rule 22(2)	2

Statutes

United States Code, Title 18, Sec. 2	5
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 18, Sec. 2312	4, 5
United States Code, Title 18, Sec. 2314	5
United States Code, Title 18, Sec. 3481	4
United States Code Annotated, Constitution Amendments 1-5, p. 102	4
United States Code Annotated, Constitution Amendments 1-5, p. 297	4
United States Code Annotated, Constitution Amendments 6-14, p. 4	4

Page

United States Constitution, Fourth Amendment 3

United States Constitution, Fifth Amendment 4

United States Constitution, Sixth Amendment 4

Textbook

Canons of Professional Ethics of American Bar Association, Canon 37 14

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 7, 1968.

Opinion Below.

The opinion of the court below in this case, the United States Court of Appeals for the Ninth Circuit, printed in Appendix hereto, *infra,* has not yet been printed in Federal Reporter.

Jurisdiction.

The judgment of the Circuit Court of Appeals was dated June 7, 1968 and entered on the same date. A petition for rehearing, filed on July 5, 1968 was denied on July 18, 1968 (Appendix *infra*).

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

Questions Presented.

1. On the matter of the right to effective assistance of counsel—or the right to represent himself—of an accused:

a. Does an accused have the right, where the request is made prior to trial, not to be represented by counsel?

b. Does an accused have the right to discharge and decline to use a privately employed counsel for a co-defendant with whom he does not agree?

c. Are the substantive rights of both accused denied and both deprived of effective assistance of counsel, where the court orders both to trial represented by one private counsel, who prior to trial informed the court that a possible conflict of interest may exist between the two, that he had been unable to agree with one of the accused as to the handling of the case, which accused did not wish to be represented by him, and asked to be relieved from representation of that defendant?

2. Is the burden of proof shifted to an accused to establish his innocence and is he denied the right to remain silent and suffer no penalty therefrom, by an instruction from the court to the effect that the jury may draw the inference and find guilt from possession of recently stolen property unless the accused satisfactorily explained the same?

3. Is the admission in evidence of police possessed tags and items relating to stolen vehicles which were

momentarily placed in the hands of a defendant (by a ruse) to arrest him without a warrant at a time when he was not in the commission of a crime (adequate time for obtaining a warrant existed) so as to use the items in evidence against him, a denial of the substantive rights of such defendant?

4. Is the admission of hearsay documents—receipt for truck parts and gasoline receipts—containing a name like that of an accused—which was not found in the possession of the accused and not identified as being related to the accused, a denial of due process?

5. Where at the instance of a civilian employee of an insurance company organization, a state police officer, without arrest, places the driver and relief driver of a truck in technical custody (the registration papers having checked out) while the civilian puts on coveralls and makes an extensive search of the vehicle, to thereafter show the officer a cab number he claims corresponds with a number phoned to him by the police as from a truck reported stolen, the parties then being placed under arrest, has there been an unlawful search and seizure warranting suppression of the papers thereafter taken from the defendant driver?

Constitutional Provisions and Statutes Involved.

1. The Fourth Amendment to the United States Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized."

United States Code Annotated, Constitution Amendments 1 to 5, page 102.

2. The Fifth Amendment to the United States Constitution, the pertinent part of which provide:

". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; . . ."

United States Code Annotated, Constitution Amendments 1 to 5, page 297.

3. The Sixth Amendment to the United States Constitution, the pertinent part of which provides:

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

United States Code Annotated, Constitution Amendments 6 to 14, page 4.

4. 18 U.S.C. 3481, which provides:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

5. 18 U.S.C. 2312 which provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5000 or imprisoned not more than five years, or both."

6. 18 U.S.C. 2314, the pertinent provisions of which provide:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

7. 18 U.S.C. 2, the pertinent provisions of which provide:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Concise Statement of Case.

By indictment filed May 25, 1966, in the United States District Court, Central District of California, [typed transcript p. 2] petitioner Roger Lee Glavin was charged with violation of 18 U.S.C. Section 2312—transportation of a motor vehicle in interstate commerce knowing the same was stolen—in two counts and violation of 18 U.S.C. Section 2314—transportation of stolen merchandise (refrigerated trailer) over the value of $5,000 in interstate commerce, which was known to have been stolen . . . and petitioner Robert Loring Chesney was charged with aiding and abetting in the commission of two counts of transporting vehicles in commerce knowing them to have been stolen, this in violation of 18 U.S.C. Section 2 [typed transcript p. 2]. Each petitioner herein pleaded not guilty to each count of indictment [Minute Order 6/16/66; typed transcript p. 5].

At time for trial on June 27, 1966, and prior to the commencement thereof before the selection of a jury, counsel for petitioners herein made the following motion:

"Mr. Baumen: Your honor, it appears that there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would, therefore, move the Court at this time to be relieved of representing Mr. Glavin." [Supp. typed transcript p. 2, lines 8-15].

The Court responded to the motion as follows:

"The Court: Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desire. So I would deny your motion Mr. Baumen and we will proceed to try the case." [Supp. typed transcript p. 2, lines 16-23].

A motion to suppress documents, papers, instruments and written data taken from petitioner Roger Lee Glavin by Police Officers and Highway Patrolmen about May 2, 1966, upon the ground that such documents were taken as a result of an unlawful search and seizure claiming that the documents were seized without a warrant and prior to defendant being arrested and that no reasonable or probable cause existed for search or arrest, was made on June 27, 1966 [Clk. typed transcript p. 11].

The motion was heard on June 28, 1966, and denied [Rep. typed transcript pp. 98-128].

The documents were admitted into evidence over objections as government's Exhibit 12E (13 receipts) [Rep. typed transcript p. 422]; Exhibit 12L (driver's log book) [Rep. typed transcript p. 431, line 7, to p. 432, line 7]; Exhibit 12M (driver's log book) [Rep. typed transcript p. 434, line 3, to p. 435, line 7].

The Court also admitted in evidence as government Exhibit 9A a document found in a truck in the possession of Leon Glavin, co-defendant, which document purported to be a receipt for a truck part to an entity "Chesney Trk" over objection of defendant Chesney as to hearsay and not connected up with him in any manner [Rep. typed transcript p. 343, line 18].

The case was tried before a jury from June 27, 1966, through June 30, 1966 [Clk. typed transcript, Minute Order pp. 6, 19, 20 and 21].

At the conclusion of the government case, the following motions were made by counsel for the petitioners herein:

(a) A motion to strike the evidence which had been subject to the motion to suppress [Rep. typed transcript p. 545];

(b) A motion on behalf of petitioner Chesney herein to strike Exhibit 9A which was a receipt for a truck part made to "Chesney Trk" and not taken from Chesney nor connected up with him; [Rep. typed transcript pp. 545 and 546];

(c) A motion on behalf of petitioner Chesney herein to strike government's Exhibits 14G, H and I on

the claim of partial entrapment and nonpossession by Chesney [Rep. typed transcript p. 546, line 14, to p. 554, line 5]; and

(d) A motion for judgment of acquittal on behalf of petitioner Chesney herein all of which motions were denied [Rep. typed transcript p. 554, lines 3-15].

Objections were then made to the Court as to a proposed jury instruction which objection was denied [Rep. typed transcript p. 562, line 10, to p. 566, line 11]. The Court gave the instruction the pertinent parts of which are:

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"And, possession of property recently stolen, if not satisfactorily explained is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . .

"If the jury should find beyond reasonable doubt from the evidence in the case that the International tractor described in Count 1 of the indictment were stolen, and that while recently stolen, the property was in the possession of one of the

accused, the jury would ordinarily be justified in drawing from those facts the inference, not only that the International Tractor was possessed by the accused with knowledge that the property was stolen, but also that the accused participated in some way in the theft of the property, unless possession of the recently stolen property by the accused is explained to the satisfaction of the jury by the facts and circumstances and the evidence in the case; and the same proviso applies in the case of the tractor in Count II." [Rep. typed transcript p. 596, line 20, to p. 598, line 10].

An exception was taken to such instruction [Rep. typed transcript p. 604, line 12, to p. 605, line 14].

The jury returned a verdict of guilty as to each of the petitioners herein as to each charge count charged and thereafter a motion for judgment of acquittal and motion for a new trial were filed on behalf of both petitioners both of which were denied [Rep. typed transcript p. 608, line 1, to p. 609, line 8 and Clk. typed transcript pp. 24, 26 and 29].

Sentences were then pronounced as to each of the petitioners here in sentencing each of them to five years in prison as to each count. Such judgments were filed July 12, 1966 [Clk. typed transcript pp. 30 and 21].

Both petitioners appealed and the Appellate Court rendered its judgment on June 7, 1968 affirming the Court below (Case No. 21374—the decision has not been printed in the Reports as yet).

A petition for rehearing was timely filed and thereafter denied on July 18, 1968.

Reasons for Granting the Writ.

1. Ruling Contrary to the Decision of This Court on Assistance of Counsel.

The decision of the Court of Appeals in the instant case appears to be in conflict with the decision of this Court in the case of

Glasser v. United States, 315 U.S. 60 (1942).

Rather than follow and apply the rule in that case it appears that the Court of Appeals herein has laid down technical and onerous conditions for its application which has the effect of either changing the rule (as to Ninth Circuit cases) or denying its application except on meeting the additional requirement which have been set up by the Court of Appeals.

It has been 26 years since the decision of this Court in the *Glasser* case. There have been a number of cases in this circuit which seem to skirt the rule laid down therein regarding assistance of counsel, including

Juvera v. United States, 378 F. 2d 433 (1967);

Lugo v. United States, 350 F. 2d 858 (1965); and

Gonzales v. United States, 314 F. 2d 750 (1963).

The facts in none of those cases are as strong for the application of the *Glasser* case rule as exists here and in the present case it appears that the Court has taken a long step away from the rule itself. It also appears that Appeal Courts in other circuits have set up certain guide lines when the rule in the *Glasser* case is declared not to be applicable which may have the effect at nibbling away at the rule itself.

In the light of the many clarifications which this Court has made in the past decade regarding the Constitutional rights of persons accused of crime and in the light of the nibbling away at the rule in the *Glasser* case by the Circuit Courts the matter should be settled by this Court to spell out the applicability and non-applicability of the rule in situations where it is claimed that there was a conflict of interest between several accused represented by one counsel.

In the *Glasser* case, one counsel represented two defendants. The Court was advised that the possibility that conflicting interest might arise which would diminish the attorney's usefulness to Glasser (315 U.S. p. 76). This Court held that it was error for the lower court, with this knowledge, to have permitted the one counsel to continue to repesent the two defendants and that Glasser was denied his right to have the effective assistance of counsel guaranteed by the Sixth Amendment.

This Court in the *Glasser* case (315 U.S. at p. 75) stated:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness."

and at 315 U.S. page 76, the Court further stated:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . . Of equal im-

portance with the duty of the Court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel and the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently to represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court."

In the present case, prior to commencement of trial and at the first opportunity before the Court (who had been assigned to this district from the state of Washington to try the case) counsel for the two appellants herein stated:

"Your honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would, therefore, move the Court at this time to be relieved of representing Mr. Glavin." [Supp. typed transcript p. 3, lines 8-15].

The Court does not challenge or dispute the existence of the conflict of interest but summarily denied the motion in the interest of expediency and directed that the trial commence.

The Appellate Court has engaged in nice calculations as to the meaning of the expressions used stating that they suggested rather than a conflict of interest the problem that one of counsel's two clients were dissatisfied with him and wished to replace him.

Also, the Appellate Court in this decision commented that counsel had represented Roger Glavin for at least

three weeks and the motion was presented on the day set for trial.

It was pointed out to the Court on the oral argument in the presence of the counsel for the government who tried the case that it was not until Friday night, before the trial on Monday that counsel was afforded the oportunity to inspect all of the exhibits proposed to be used and thus it was only on the week-end before trial that counsel was able to confront the accused with all of the facts and demand answers and suggest certain procedures for handling of the case for each of the defendants. Mr. Glavin did not agree and it appeared that the interests of Mr. Glavin and Mr. Chesney would conflict. Mr. Chesney wanted to take the witness stand and testify. This was immediately brought to the attention of the trial court on the first available court day and prior to trial. The result of this denial was that one attorney was forced to represent two defendants, one of whom should have taken the witness stand and testified but whose testimony would have been highly detrimental to the other defendant as a result of which the matter had to be compromised and neither defendant took the witness stand thereby resulting in ineffective representation of both defendants.

The essence of the Appellate Court decision herein is that merely advising the Court of the possible conflict of interest, that the defendant and the attorney cannot agree on the handling of the case and that one of the accused does not wish that attorney to represent him is not enough. The decision implies that in this situation where the Court has denied the motion that lawyer for the defendants with the conflicting interests must risk the anger of the Court by coming forward and in

open Court laying bare the confidential details given him by each of the accused to display on the record the details of such conflict, however detrimental it may be to his client, or else the accused are forever barred from raising such a claim. Is the *Glasser* case rule to be qualified and limited by such restrictions? How much disclosure of the intimate details by the client must be given to the Court in order to obtain the benefit of the *Glasser* case rule where such conflict does actually exist?

It appears that these limitations placed by the Appellate Court are unreasonable and without merit. Under the decisions in the California State Courts, where the counsel practices, it is held to be improper for an attorney representing defendants where a conflict does occur to disclose the facts of the same as this would violate his duty to preserve his client's confidence and would be contrary to Canon 37 of Canons of Professional Ethics of the American Bar Association.

2. Decision Upholding Instruction That Guilt May Be Inferred Appears to Conflict With Decision of This Court.

The decision of the Appellate Court in the instant case appears to conflict with the intent and reasoning in the decision of this Court in

Morissette v. United States, 342 U.S. 246 (1952).

(It likewise seems that the dissenting opinion in the decision of this Court

United States v. Gainey, 380 U.S. 63

would be applicable to the facts herein.)

In the *Morissette* case, the defendant was charged with stealing some bomb castings from a government bombing range, admitted that he took them but testified that he thought that they were abandoned and that he did not intend to steal them. Whereupon the Court instructed the jury that felonious intent could be presumed from defendant's act of taking the item. This Court held that such instruction was erroneous and that such incriminating presumptions are not to be improvised by the judiciary.

In the instant case the trial court instructed the jury:

> "and possession of property recently stolen if not satisfactorily explained, is ordinarily a circumstance from which *the jury may reasonably draw the inference* and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property . . ." (emphasis added).

Counsel for the accused strongly opposed the giving of such instructions and urged on the Court that it shifted the burden of proof as to innocence to them and denied them the constitutional right to remain silent and suffer no penalty therefrom.

The Appellate Court disagreed holding that the jury was instructed to do no more than accord to the evidence, if unexplained, its natural probative force, citing the case of

United States v. Gainey, 380 U.S. 63 (1965).

The *Gainey* case was one involving an inference declared by statute and would appear factually to have no applicability herein.

Moreover, this Court in the case of:

Griffith v. State of California, 380 U.S. 609 at page 614 stated:

> "What the jury may infer given no help from the Court is one thing. What it may infer when the Court solemnizes the silence of the accused into evidence against him is quite another."

Also at 380 U.S. on page 615, the Court stated:

> ". . . The Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."

The Appellate Court states that since other instructions were given that no inference can be drawn from the fact that the defendant did not testify that the instruction to the effect that the jury could infer guilt from possession of property unless the defendant explained it was a proper one.

Of two conflicting instructions, one that you could infer guilt from possession unless the defendants explained the same and the other that there was a presumption of innocence and you should not infer guilt from failure to testify, which would the jury follow? One appears to be specific, the other general and in the common course of things it appears here that the Court has given help to the jury in arriving at a determination of guilt to the detriment of the defendant and contrary to the rule laid down in the decision of this Court in *Morissette v. United States, supra.*

3. Important Question of Law Which Should Be Settled.

The decision of Court of Appeals in the instant case rules on an important question of Federal Law which has not been but should be settled by this Court as it lies in the shadows of several rules.

To capsule the facts, a government witness, Buehler, testified that he had been arrested along with the brother of petitioner Glavin herein in connection with a stolen truck; that Mr. Chesney telephoned to inquire what happened and he told him that Glavin's brother had been arrested but he had been released; Mr. Chesney informed him that petitioner Glavin was in town but did not want to go to his brother's place and that there was a package containing tags and papers at petitioner Glavin's brother's house which he would like to be able to pick up and deliver to him.

Buehler picked up the package and turned it over to the Police who took it to the Police lab and photographed it and spent considerable time cataloging the same and returned it to Mr. Buehler with instructions to deliver it to Mr. Chesney. Mr. Chesney was not at his place of business and the Police told Mr. Buehler to call him at home and set up a meeting. This Mr. Buehler did. When Mr. Chesney arrived Mr. Buehler put the package in his hands and the Police and FBI arrested him simultaneously. Mr. Chesney never opened the package and there was no other evidence connecting him with the transaction.

It was objected to that this was in the nature of an entrapment procedure, that the defendant was not committing any crime at the time that the event occurred, that if the police believed that he were guilty

of crime they had adequate time to have secured warrants and that the placing of the package in his hand momentarily and arresting him simultaneously therefor was used solely for the purpose of utilizing the not-known-to-the defendant contents of the package in evidence against him.

The Court of Appeals in this case held that this was proper. If the material placed in Mr. Chesney's hands were contraband, were narcotics or an item which the possession of it in and of itself constituted a crime some basis for the ruling could be reasoned. Moreover, if Chesney were in the course of the commission of a crime at the time of this police-set-up then again reason would indicate that the arrest was proper and possibly the use of the then unknown contents of the package against him. However, this was a police set up renewed and initiated by the police after the original contact with Chesney had been broken off. It was their show. We have, therefore, not so much search and seizure but a situation of long possessed, police controlled evidence planted on a defendant—the possession of which was not a crime—for the sole purpose of using it against him to indicate guilt for a crime for which he was not then arrested.

Is subterfuge and deceit in evidence to become a part of a judicial process? If not, then this is a field and an area in which this Court should lay down clear guidelines for the Courts to follow to prevent the utilization of such a subterfuge—the subterfuge was on the jury—to obtain a conviction. Such a situation herein was doubly detrimental when the defendant was hampered by an attorney with divided interest and could not take the stand to testify in his own behalf.

4. Additional Errors.

While perhaps these do not have the scope to bring them fully within the considerations laid down by this Court governing review on certiorari, there are two additional points which are urged to have been error on the part of the Appellate Court in the instant case.

A. Admission Without Foundation of Hearsay Documents.

The trial court admitted in evidence without connecting up to the defendant Robert Chesney an invoice for sale of a truck part, found in one of the stolen vehicles to "Chesney Trk." The Court also admitted a number of receipts and memorandum of delivery bearing a credit card imprint in the name "Robert L. Chesney." The Appellate Court indicated that there was some risk that the jury might take the documents as proof of the facts which they purported to record but the task of balancing the probative values against probative dangers rested with the judge.

The Court apparently passed over the matter of connecting up the same with Mr. Chesney or some foundation tying him to the documents.

A private writing, document or paper can only be admitted where there is extensive proof of identity and genuineness as the writing does not prove itself.

Hartzell v. U.S. CCA, (Iowa), 72 F. 2d 569.

In order to introduce in evidence a paper or document connecting up a defendant or against a defendant, some foundation must be laid showing that connection.

Wolcher v. U.S., (Ninth Circuit) 200 F. 2d 493.

B. Search, Arrest Then Seizure.

Defendant, Roger Glavin, and a driver, at the instance of a civilian employee of the National Theft Agency, an insurance company sponsored organization, were held in technical custody by a highway patrol officer while the civilian put on coveralls and made an extensive search of the vehicle. After such search he showed the officer a number which he claimed he had received by phone from the Police in Los Angeles. Roger Glavin was then placed under arrest and his documents and papers in the truck were seized.

A Motion to Suppress was denied. The Appellate Court held that the trial Court was proper in its ruling. The question is a close one but a careful reading of the transcript disclosed clearly that while the defendant was being held in technical custody such an extensive search was undertaken, tests, etc., that the civilian had to put on coveralls to conduct the same.

The police officer testified that the registration papers checked out. Therefore, any reasonable or probable cause for inspection had passed when the search began which search was followed by an arrest.

It was urged on the Appellate Court below that this situation was squarely within the rule of

Henry v. United States, 371 U.S. 98.

The Court did not agree, ruling there was probable cause.

It is urged that no probable cause existed, that the registration checked out, that the search itself was purely exploratory and that the arrest was the result of what the exploration purported to reveal.

Conclusion.

In order to settle important questions of Federal law not now settled, and in order to lay down guide lines as to what initial showing a defendant or his attorney must make to the Court where it is claimed that a conflict of interest exists between two accused represented by the same counsel, and in order to clarify whether a Court may indirectly comment on the failure of a defendant to testify by instructing the jury that they may infer and find guilt from possession of recently stolen property unless the defendant explains the same and for the other reasons set forth herein it is respectfuly urged that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

G. G. BAUMEN,
Counsel for Petitioners,

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Roger Lee Glavin and Robert Loring Chesney, *Appellants,* vs. United States of America, *Appellee.* No 21,374.

[June 7, 1968]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and BROWNING, Circuit Judges, and POWELL, District Judge.

BROWNING, Circuit Judge:

These are appeals from convictions under 18 U.S.C. § 2312 (1964) (interstate transportation of stolen motor vehicle), and 18 U.S.C. § 2314 (interstate transportation of stolen goods).

1. On the day set for trial the attorney who had been retained by both appellants (and who represents both on appeal) moved to be relieved of representing appellant Roger Glavin. Both appellants claim that the court committed error in denying the motion.

The proceedings on the motion are set out in full in the margin.[1] The precise ground for the motion was

[1]COUNSEL: Your Honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would therefore move the Court at this time to be relieved of representing Mr. Glavin.

(This footnote is continued on the next page)

not clearly articulated. Counsel began by stating, "it appears there may perhaps be a conflict of interest here," thus suggesting the existence of the problem dealt with in *Glasser v. United States,* 315 U.S. 60 (1942), namely, that common counsel was representing two defendants who had inconsistent interests. Counsel continued, however, "Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him," thus suggesting that rather than a conflict of interest caused by the common representation the problem was that one of counsel's two clients was dissatisfied and wished to replace him.

The court apparently placed the latter construction on counsel's remarks, so that an exercise of its discretion was required. *Good v. United States,* 378 F.2d 934, 935-36 (9th Cir. 1967). We cannot say that the court improperly exercised that discretion since counsel had represented appellant Roger Glavin for at least three weeks, the motion was presented on the day set for trial, no justification was offered for the lateness of the motion, and the court had been advised that the trial, scheduled to begin immediately, would require the appearance of nineteen witnesses, some from out of state, and would continue for four days.

Appellants now contend that the motion was intended to advise the court that there was a conflict of interest between the two appellants and that, therefore,

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THE COURT: Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desired. So I would deny your motion, Mr. Baumen, and we will proceed to try the case.

representation of both by a single attorney would deprive them of effective assistance of counsel. Denial of such a motion is reversible error where there is some possibility that appellants have divergent interests so that one or both might not receive "untrammeled and unimpaired" assistance from common counsel. *Glasser v. United States,* 315 U.S. 60, 70 (1942).

But common representation is not error *per se.* There must be some possibility of conflicting interest, and hence of prejudice.[2] Appellants did not identify any possible divergence of interest in the trial court; there briefs to this court suggest none; the government contends that no possible conflict could have existed; and we have found none in our examination of the record.

2. Appellant Roger Glavin complains of the denial of his motion to suppress evidence found in what he contends was an illegal search of one of the two stolen trucks.

An inventory taken at the Montebello, California, branch of the International Harvester Corporation on March 3, 1966, disclosed that a 1966 International Harvester long wheel base, 10-wheel diesel truck was missing. An inventory taken on April 12 at the Glendale, California, branch disclosed the absence of a 1966 Inter-

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[2]Cases from this court include Juvera v. United States, 378 F.2d 433, 437-39 (1967); Kaplan v. United States, 375 F.2d 895, 898 (1967); Lugo v. United States, 350 F.2d 858, 859 (1965); and Gonzales v. United States, 314 F.2d 750, 752 (1963).

See also Lollar v. United States, 376 F.2d 243, 244-47 (D.C. Cir. 1967); United States v. Paz-Sierra, 367 F.2d 930, 933 (2d Cir. 1966); United States v. Armone, 363 F.2d 385, 406 (2d Cir. 1966); Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965); United States v. Dardi, 330 F.2d 316, 335 (2d Cir. 1964); United States v. Bentvena, 319 F.2d 916, 937 (2d Cir. 1963). *Cf.* 18 U.S.C. §3006A(b) (1964).

national Harvester 3-axle diesel truck equipped with a refrigeration unit. The Montebello truck was recovered on May 2. Lyman Ross, a special agent of the National Auto Theft Bureau, was present and observed that the stolen Montebello truck had been repainted in a red and white pattern. The next day Agent Ross saw a truck on the highway which met the description of the stolen Glendale truck, which was painted the same color combination as the recovered Montebello truck, and which was pulling a trailer similar to one which Agent Ross knew had been stolen earlier in East Los Angeles. Agent Ross followed the truck until it pulled into a service road whereupon he radioed the California Highway Patrol. He explained to the officer who responded to his call why he believed the truck to be the one stolen from Glendale. The officer and Agent Ross followed the truck when it resumed its journey. It stopped again at a weighing scale. The officer then asked the driver to move the truck to an adjacent parking area. There Agent Ross opened the door, discovered that the cab serial number was the same as that of the stolen Glendale truck, and so informed the officer. The officer arrested the driver, Larry Rexius, and appellant Roger Glavin, who was also in the truck.

Appellant Roger Glavin argues that the warrantless search which disclosed the serial number was unlawful, that the subsequent arrests of Rexius and appellant Roger Glavin were tainted by the search and were also unlawful, and that therefore certain evidence discovered in the search of the truck immediately after the arrests should have been suppressed.

If detaining the truck and checking its serial number constituted a "search" or "seizure" (see *Cotton v.*

United States, 371 F.2d 385, 393 (9th Cir. 1967)), it was supported by probable cause to believe the truck was recently stolen by those in possession, and that evidence verifying the identification of the vehicle as the stolen truck would be found by the search. The officers were justified in proceeding without a warrant by the "exceptional circumstance" created by the truck's mobility.[3]

3. Appellant Chesney contends that certain evidence taken from one of the trucks was improperly admitted as to him.

In a search of the Montebello truck incident to the arrest of Bazil Buehler and defendant Leon Glavin (appellant Roger Glavin's brother),[4] the police discovered an invoice reflecting the sale of a truck part by Motor Truck Distributing Co. to "Chesney Trk." In the search of the Glendale truck the police discovered a number of receipts or memoranda of delivery bearing a credit card imprint in the name "Robert L. Chesney," reflecting the purchase of diesel fuel. In objecting to their admission, counsel referred to the documents as "hearsay," but the basis for the objection reflected in counsel's extended colloquy with the court was that any legitimate inference of connection between appellant Chesney and the theft of the trucks which might be

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[3]Dyke v. Taylor Implement Co., ... U.S. ...., ... (1968); Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925). *Cf.* Chapman v. United States, 365 U.S. 610, 615 (1961); United States v. Jeffers, 342 U.S. 48, 52 (1952); Johnson v. United States, 333 U.S. 10, 15 (1948).

Appellant relies upon Henry v. United States, 361 U.S. 98 (1959), and Mosco v. United States, 301 F.2d 189 (9th Cir. 1962), but in neither case was the search supported by probable cause.

[4]Leon Glavin was indicted and convicted but did not appeal.

drawn from the presence of these documents bearing his name in the trucks was remote while the danger that an improper inference would be drawn was great. Thus the objection was not one of hearsay since the documents were not being submitted to prove the occurrence of the sale transactions or the existence of any other fact which the documents purported to record. The documents were submitted only in proof of their own existence; their presence in the trucks was offered for its probative value on the issue of appellant Chesney's involvement in the theft. In admitting the documents the court carefully reviewed the other evidence in the record which connected appellant Chesney with the trucks and lent weight to the inference of Chesney's involvement. There was no doubt a risk that the jury might take the documents as proof of the facts they purported to record—that appellant Chesney's credit had been used to purchase parts and fuel for the trucks—facts as to which the documents were hearsay.[5] But the task of "balancing . . . probative values against probative dangers" rested with the trial judge, and we are not prepared to say that his ruling exceeded the "leeway of discretion" vested in the court in resolving problems of this kind. McCormick, Evidence § 152 at 320 (1954).

4. Appellant Chesney argues that certain other evidence was improperly admitted.

Two men—Bazil Buehler and Leon Glavin—were in the Montebello truck when it was recovered. Both were arrested. The police, believing Buehler was not in-

[5]We do not mean to suggest that admission of the documents for this purpose would necessarily be error. See Morrow v. States, 59 A.2d 325, 326, 190 Md. 559 (1948).

volved, released him. On the following afternoon appellant Chesney telephoned Buehler and asked Buehler to go to Leon Glavin's house to get a package for him containing license tags, pieces of blank metal, and various papers. Buehler called the police and told them of Chesney's request. He was told to pick up the package and notify the police. When Buehler reached home he discovered that Leon Glavin's wife had given a package to Buehler's wife. The package contained the items described by Chesney. Buehler called the police, who met him, examined and photographed the items in the package, and told him to complete the delivery to Chesney if he could. Buehler called Chesney and told him he had the package. Chesney asked Buehler to meet him at the Greyhound Bus terminal. Buehler did so, and turned the package over to Chesney, who stated, Buehler testified, that he "was glad to get it, because if it got in the wrong hands it could put them all behind bars." The police then arrested Chesney.

Appellant Chesney objected to the introduction of the contents of the package on the ground that the facts disclosed an "entrapment procedure" by which the police "planted" the package in Chesney's "temporary custody" for the purpose of implicating him. The trial court overruled the objection on the ground that the idea for the delivery of the package originated with Chesney and not the police. The court saw nothing objectionable in the fact that the police had suggested to Buehler that he complete the delivery of the package as Chesney had requested. As the court noted, "no one asked Mr. Chesney to take it, according to the testimony; he asked for it; he got it."

We agree. The police did not "entrap" appellant Chesney or "plant" the evidence upon him; they were under no obligation to prevent him from implicating himself by interrupting the chain of events which he had set in motion.

5. Both appellants urge that there was error in the instructions.

The trial court instructed the jury that possession of recently stolen property "if not satisfactorily explained" is a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence that the possessor knew the property was stolen and participated in the theft. Appellants argue that the instruction diminished the presumption of innocence by imposing on them the burden of negating the elements of the crime and that it violated the Fifth Amendment by permitting an adverse inference from their failure to testify.

The court instructed the jury that the burden is "always" upon the prosecution to prove every element of the crime beyond a reasonable doubt, that the defendants were presumed innocent, and that the presumption of innocence was sufficient to acquit unless the jurors were satisfied beyond a reasonable doubt of the guilt of each defendant "from all the evidence in the case." The inference from possession of recently stolen property was not given conclusive effect. On the contrary, the jury was told that possession of recently stolen goods was "ordinarily" a circumstance from

which knowledge and participation could be inferred. It was made explicitly clear that possession was to be considered "in the light of surrounding circumstances in the case"; and that it was "the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused." In sum, the jury was instructed to do "no more than 'accord to the evidence, if unexplained, its natural probative force.'" *United States v. Gainey*, 380 U.S. 63, 71 (1965). *Cf. Turner v. United States*, ... F.2d ....., ... (9th Cir. 1968). These instructions did not shift the burden of proof to appellants. Indeed, the jurors were told "the law never imposes upon a defendant in a criminal case the burden of producing evidence."

Nor did the instructions compel the appellants to testify. As the court instructed the jury: "In considering whether possessio of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." The court added: "A defendant in a criminal case is not required to take the stand and

testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it. The presumption of innocence still applies to him. And if from the evidence adduced by the government and from the testimony of such witnesses as the defendant has produced, or either of them, a reasonable doubt arises in your mind as to the defendant's guilt, you should acquit him." *Cf. United States v. Gainey*, 380 U.S. at 70-71.

Affirmed.

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	12

CITATIONS

Cases:

Battaglia v. *United States*, 205 F. 2d 824 7
Brinegar v. *United States*, 338 U.S. 160 11
Carroll v. *United States*, 267 U.S. 132 11
Glasser v. *United States*, 315 U.S. 60 5
Good v. *United States*, 378 F. 2d 934 6
Roviaro v. *United States*, 353 U.S. 53 7
United States v. *Bentvena*, 319 F. 2d 916, certiorari denied, *sub nom. Mirra* v. *United States*, 375 U.S. 940 6
United States v. *Dardi*, 330 F. 2d 316, certiorari denied, 379 U.S. 845 6

Statutes:

18 U.S.C. 2312 2
18 U.S.C. 2314 2

Miscellaneous:

McCormick, *Evidence*, § 229 11

319-831—66

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 512

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 412

ROGER LEE GLAVIN AND ROBERT LORING CHESNEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1968. A petition for rehearing was denied on July 18, 1968. The petition for a writ of certiorari was filed on August 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court erred in denying the motion of the attorney retained

by both petitioners in which he sought to withdraw as counsel for one of them.

2. Whether the trial court violated the presumption of innocence and the privilege against self-incrimination by instructing the jury on the inference which may be drawn from facts showing possession of recently stolen property.

3. Whether the police "planted" on petitioner Chesney evidence which was later admitted at trial.

4. Whether the conclusion that the truck in which petitioner Glavin was arrested was stolen turned on an illegal search, necessitating suppression of evidence obtained from a search of his person at the time of his arrest.

5. Whether the trial court properly admitted documents showing petitioner Chesney's involvement in the crime.

STATEMENT

Petitioners were tried in the United States District Court for the Central District of California. Petitioner Glavin was convicted on two counts charging interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312, and on one count charging interstate transportation of stolen property in violation of 18 U.S.C. 2314. Petitioner Chesney was convicted on the two counts charging interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312.[1] Each petitioner was sentenced to concurrent five-year terms on each count. The court of appeals affirmed (Pet. App.).

[1] Petitioner Roger Glavin's brother, Leon, was also convicted, but did not appeal.

The sufficiency of the evidence is not challenged here. On or about February 9, 1966, a 1966 International Harvester Truck (hereafter the "Montebello truck") was stolen from the Montebello branch office of International Harvester Corporation (2R. 11–12, 21). Among other identifying marks, the engine was fitted with fuel pump No. 357822 (2R. 161). Shortly thereafter, a truck similar in description was observed in a garage rented by petitioner Glavin in North Hollywood, California, where it was being worked on by Glavin and Chesney. Petitioner Glavin and his brother painted the truck red and white (2R. 72–80, 132, 149).

In late February or early March 1966, petitioner Glavin entered into a contract to haul freight for the Western Fruit Express Company. Using the Montebello truck, he hauled a load from Los Angeles to Vero Beach, Florida, and returned (2R. 223–230; 3R. 301).

During the first week in April 1966, a 1966 International Harvester truck (hereafter the "Glendale truck") was stolen from the Glendale branch of International Harvester (2R. 32–33, 41–43). Among other identifying marks, the cab bore serial No. A 47271 (2R. 59). On April 9, 1966, a refrigerated trailer, bearing Serial Number 8421, was stolen from Hauling Equipment, Inc. (2R. 180–185).

The following day, a truck similar to the Glendale truck was observed at the home of petitioner's brother, Leon Glavin, where both petitioners were preparing it for painting (3R. 454–458). On April 12, petitioner Glavin and another drove the Glendale truck and re-

frigerated trailer from Los Angeles to Lima, Ohio, and then returned (2R. 242–253).

On May 2, 1966, a police officer with the Los Angeles Police Department observed a truck similar in description to the Montebello truck parked in Los Angeles. After comparing the fuel pump number with that of the Montebello truck, they placed it under surveillance. Eventually, Leon Glavin got into the truck and drove away. He was later arrested (3R. 290–295).

The arrest of petitioners is discussed *infra*, pp. 8–10, in connection with their specific contentions.

ARGUMENT

1. On the first day of trial, defense counsel, who had been retained by both petitioners, moved to be relieved of his representation of Glavin. Counsel stated (4R. 2):

> Your Honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would therefore move the Court at this time to be relieved of representing Mr. Glavin.

In denying the motion, the trial court ruled (4R. 2):

> Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears that these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desired. So I would deny

your motion, Mr. Bauman, and we will proceed to try the case.

Relying upon *Glasser* v. *United States*, 315 U.S. 60, both petitioners contend that the trial court's denial of the motion constituted reversible error. *Glasser*, however, presented a situation different from that here involved: in that case at the opening of trial the district court, over Glasser's personal objection, appointed the lawyer that Glasser had retained to act also as counsel for a co-defendant. This Court emphasized that the vice in those circumstances was the trial court's affirmative creation of an evident conflict of interest. See 315 U.S. at 70–71. By contrast, in this case petitioners themselves had agreed upon a single lawyer, and he was in no fair sense imposed upon one of them. In addition, here, unlike the situation in *Glasser*, the threat of a serious conflict of interest was never meaningfully "brought home" to the trial court. 315 U.S. at 71, 76. Although counsel at first mentioned the possibility of a "conflict of interest", he went on to intimate that what was involved was not a potential inconsistency in defenses on behalf of his two clients, but was rather Glavin's dissatisfaction with counsel's trial strategy. The trial court's reference to the adequacy of the time for petitioners to have arranged other representation indicates that this was his understanding of the objection. No further indication that counsel was concerned about inconsistent defenses and divided loyalties was given. Thus, the trial court was actually requested to rule on a motion to be relieved because of a last minute disagreement between counsel and client. Taking into account that Glavin

had had an ample opportunity to secure other counsel, that the motion was not made until the day set for the opening of trial, and that the court had been advised that some nineteen witnesses, some from out-of-state, were to be called (Pet. App. 2), the trial court did not abuse its discretion in proceeding to trial. See *Good* v. *United States*, 378 F. 2d 934, 935–936 (C.A. 9).

Moreover, aside from counsel's belated suggestion—unsupported by the record—that Chesney would have testified in his own behalf had the joint representation been terminated (Pet. 13), there is no showing or substantial suggestion of any prejudice that resulted from joint representation. In these circumstances, and in view of the overwhelming evidence against both petitioners, the fact that both of them were represented by one lawyer whom they had chosen does not warrant reversal of the convictions. See, *e.g.*, *United States* v. *Dardi*, 330 F. 2d 316 (C.A. 2), certiorari denied, 379 U.S. 845; *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940.

2. The court instructed the jury (3R. 597):

> And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property.

In light of the surrounding circumstances connecting both petitioners with the theft, the instruction was proper, cf., *Battaglia* v. *United States,* 205 F. 2d 824 (C.A. 4), and petitioners do not argue that it was unrelated to the evidence. They contend instead that the instruction shifted the burden of proof, thereby diminishing the presumption of innocence, and permitted the jury to draw an inference from their failure to testify in their own behalf. These contentions are without merit.

By giving the instruction, the trial court did not shift the burden of proof, but at most recognized that the government had established a *prima facie* case and thus placed upon the accused the burden of going forward with his defense. See *Roviaro* v. *United States,* 353 U.S. 53, 63. The instruction was carefully guarded, advising the jury only that "ordinarily" possession of recently stolen goods is a "circumstance" from which a jury "may reasonably draw" an inference of involvement. Any possible problem was avoided by the express instruction that the burden of proving every element of the crime is "always" on the government (3R. 589). Thus, the court merely allowed the jury to do "no more than 'accord to the evidence, if unexplained, its natural probative force.'" *United States* v. *Gainey,* 380 U.S. 63, 71.

Nor did the charge have the effect of telling the jury that they could draw an inference of guilt from petitioners' failure to testify. The trial court explained (3R. 598, 600):

> In considering whether possession of recently stolen property has been satisfactorily ex-

plained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused.

* * * * *

A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it.

3. After petitioner Glavin's brother and one Bazil Buehler were arrested in the Montebello truck, Buehler was released. Petitioner Chesney soon telephoned Buehler and asked him if he would bring him a package—containing envelopes, license tags, pink slips and papers—which was then at Leon Glavin's house (3R. 461). Fearing that he would become implicated in the crime, Buehler telephoned the police and explained the nature of Chesney's telephone call. The police advised Buehler to comply with Chesney's request (3R. 461). After acquiring the requested package, Buehler met with local police and F.B.I. agents, and the contents of the package were photographed and labeled (3R. 462, 485). Buehler then met Chesney as arranged. When Buehler gave Chesney the package, Chesney stated that "he was glad to get it, because if it got into the wrong hands it would put them all behind bars" (3R. 464–

465). Surveilling agents then placed Chesney under arrest (3R. 486).

Without challenging the accuracy of this narration, petitioner seeks to argue that these events constituted an "entrapment procedure" during which incriminating evidence was "planted" on him (Pet. 17–18). The evidence clearly showed that Buehler obtained the package at Chesney's request. There was thus no "entrapment." As the court below properly noted, the police "were under no obligation to prevent him from implicating himself by interrupting the chain of events which he had set in motion" (Pet. App. 8). Nor, of course, was the evidence found in his possession "planted." As the trial court noted in overruling an objection to the evidence, and as the court of appeals agreed, "no one asked Mr. Chesney to take it, according to the testimony; he asked for it; he got it" (Pet. App. 7).

4. When petitioner Glavin's brother and Buehler were arrested in the Montebello truck, one Lyman Ross, a special agent with the National Auto Theft Bureau (an "insurance company sponsored organization" (Pet. 20)), was present. He observed that the stolen Montebello truck had been painted in a red and white pattern (2R. 108–109). On the following day, Ross observed a 1966 International Harvester truck pulling a refrigerated trailer proceeding north on Ventura Freeway. Ross noted that the truck had the same color combination as that recovered the previous day. When the truck stopped on a service road, Ross further noted that the trailer had no license

plate. He then radioed the California Highway Patrol and requested that an officer meet him at that location (2R. 109–111). When Officer Imboden arrived, Ross explained that one I–H truck had been taken from Montebello and one from Glendale; that the truck which he was then observing had a color combination similar to that of the Montebello truck recovered the day before; and that the truck under observation was similar in description to the one stolen from the Glendale branch in East Los Angeles (2R. 111; 3R. 406).

On the basis of this information, Ross and Imboden followed the truck to the Montalvo Highway Patrol Truck Scales. Officer Imboden approached the truck and asked petitioner Glavin for the registration papers. During this time, Imboden observed that the trailer and the rear of the truck had no license plates, and that the front license plate had no quarterly registration. Ross then opened the left hand door of the cab and observed that the serial number of the cab corresponded with that of the truck stolen from Glendale. Petitioner Glavin was immediately placed under arrest (2R. 112–113). Thereafter, a search of the vehicle disclosed certain documents and other information which showed that the truck was the same as that stolen from Glendale (3R. 414–415, 419, 420, 445–446).

In the circumstances, the trial court properly denied petitioners' motion to suppress. Prior to the time when Ross entered the cab to determine the

serial number, Ross had already given Imboden sufficient information to justify a reasonable belief that the truck had been stolen. Added to this information were Imboden's own observations—*i.e.*, the lack of license plates and quarterly registration—all of which reinforced that belief. The exigencies of the situation thus justified the warrantless search. See *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132.

5. From the Montebello truck, authorities retrieved an invoice reflecting the sale of a truck part to "Chesney Trk." (3R. 297–298). The search of the Glendale truck disclosed ten diesel fuel credit card receipts bearing the name "Robert L. Chesney" (3R. 445–446). Petitioner Chesney contends that the trial court improperly received these "hearsay" documents without a proper foundation. But "hearsay" applies properly only to statements which are intended to be communicative and which are introduced to prove the truth of the facts asserted. By contrast, the fact of the statement's existence may have circumstantial significance apart from the truth or falsity of what is asserted. The test of admissibility for this latter purpose is its relevance, when compared with any danger of confusion. See McCormick, *Evidence*, §229, at p. 479 (1954). This is such a case. As the court of appeals noted (Pet. App. 5–6), petitioner Chesney's objection at trial was not that the documents were inadmissible hearsay; rather, he argued that the inference which might legitimately be drawn from their mere presence in the truck—suggesting Chesney's cooperation in the

venture irrespective of whether he had actually made the purchases recited in the receipts—was remote and off-set by the danger that the jury would draw an improper inference from them. The court below was on firm ground in holding that the trial judge's "balancing" of the probative value against potential danger, and his admission of the evidence, did not involve an abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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